action. She said so in the concluding paragraph of her affidavit. It is also echoed by the other respondents. Absence from jurisdiction of an executor who cannot afterwards be found may be a sufficient reason for revoking the grant: *In re Covell*[5] and *In re Bradshaw.*[6] But this is not such a case. His exact whereabouts are always known. Absence from jurisdiction of an executor who is always available and who has hitherto always done what needed to be done, albeit with some lapses, through solicitors who not only were capable but in the circumstances were the most suitable, cannot in our view amount to a cause, much less a sufficient cause for revoking the grant to him.

We have ventured a suggestion that in the present state of division amounting almost to hostility, the wisest course seems to be for all parties to agree to the appointment of the Official Administrator to administer the estate. The Official Administrator will obviously have to be accorded more confidence than the previous solicitors had received. The appellant was contacted by trunk call to Australia. He agreed. But the respondents consistently refused. We are unable to persuade ourselves that we have the discretion to over-ride the express wishes of the testator in the absence of any compelling reason to revoke the grant of probate to the grantee and to force the appointment of the Official Administrator on the parties.

In our view, therefore and with respect, we do not think that the respondents have made out a case for the revocation of the probate granted to the appellant. No sufficient cause has been shown by the respondents. The appeal must be allowed. The appellant shall have his costs of the appeal from the estate. The parties shall retain the costs awarded them by the High Court but the respondents shall bear the costs of the appeal personally.

Appeal allowed.

Solicitors: *Chooi & Co.; C.H. Liew & Co.; Zain & Co.*

DATUK HARUN BIN HAJI IDRIS v. OFFICER-IN-CHARGE, PUDU PRISON

[F.C. (Lee Hun Hoe C.J. (Borneo), Chang Min Tat & Syed Othman F.JJ.) January 21 & March 5, 1981]

[Kuala Lumpur — Federal Court Criminal Appeal No. 42 of 1980]

Administrative Law — Habeas corpus — Sentences of High Court — Confirmed and varied by Federal Court — Whether sentences concurrent or consecutive — Power of superior court to amend and rectify its order and warrant — Habeas corpus not available where applicant is serving sentence imposed by a superior court — Habeas corpus cannot be used to review decision of superior court — Warrant of commitment — Criminal Procedure Code (F.M.S. Cap. 6), ss. 278 & 292.

Criminal Law and Procedure — Accused sentenced in respect of two cases — Whether sentences concurrent or consecutive — Power of court to alter or review judgment — Warrant of Commitment — Criminal Procedure Code (F.M.S. Cap. 6), ss. 278 & 292.

This was an appeal from the decision of the High Court reported in [1981] 1 M.L.J. 47.

The appellant had been convicted on three charges under the Prevention of Corruption Act, 1961 and sentenced to one year imprisonment on the first charge and two years' imprisonment on the second and third charges, the sentences to run concurrently. These sentences were confirmed on appeal. Subsequently the appellant was convicted on two charges under the Penal Code and was sentenced to six months' imprisonment on the first charge and fined $15,000 on the second charge. On appeal the Federal Court enhanced the prison sentence on the first charge to four years and imposed a sentence of three years on the second charge, the sentences to run concurrently. After applications to appeal to the Yang di-Pertuan Agong had been refused, the appellant commenced his prison sentence on March 1, 1978. At that time a warrant of commitment was issued in respect of the second case which was silent on whether the sentences passed on the appellant was concurrent or consecutive to the sentences in the earlier case. Subsequently on August 29, 1979, a second Warrant of commitment was issued and backdated to February 28, 1978 with the addition of the words "but these sentences to commence on the expiration of the sentence imposed" in the first case. The appellant applied for an order of *habeas corpus* claiming that he had been illegally confined in prison from October 29, 1980, as he had already completed serving his sentence as on that date, assuming the sentences in the two cases were concurrent.

Hashim Yeop A. Sani J. dismissed the application and the appellant appealed.

Held: (1) the learned Judge was right to say in effect that this was not a case where he could grant a writ of *habeas corpus* or make a declaration. As the appellant was a convicted person serving a sentence imposed by a superior court of competent jurisdiction *habeas corpus* was not available to the appellant. Moreover *habeas corpus* cannot be used as a means of reviewing the decision of a superior court;

(2) the learned judge was perfectly correct to state that a superior court as a court of record has a inherent jurisdiction to remedy mistakes in its record e.g. accidental omission. The inherent power is an extraordinary power which ought to be exercised fairly, cautiously and rarely and only when the court considers that the ends of justice require it;

(3) the amended order or warrant in this case should not be construed as a review or alteration of the earlier order as the question of sentence remained the same. The question of functus officio did not arise in carrying out an administrative function which need not be performed in court e.g. drawing up a warrant of committal;

(4) the alteration made in the subsequent order and warrant was a rectification made solely to conform with the decision of the court made in the proper exercise of its discretion. As a court of last resort the Federal Court was perfectly competent to amend its order and warrant to reflect its real decision. That was effected by the Deputy Registrar who was merely performing an administrative function in the judicial process.

Cases and authorities referred to:-

(1) *Datuk Harun bin Haji Idris* v. *Public Prosecutor* [1977] 2 M.L.J. 155.

(2) *Datuk Harun bin Haji Idris v. Public Prosecutor* [1978] 1 M.L.J. 240.

(3) *Carus Wilson's Case* (1845) 7 Q.B. 984; 115 E.R. 759.

(4) *Gurdit Singh's Case* [1933] M.L.J. 224.

(5) *Re Francis Robert Newton* 16 C.B. 97; 139 E.R. 692.

(6) *Re Dunn* (1847) 5 C.B. 215; 136 E.R. 859.

(7) *Registrar's Circular No. 7 of 1961,* [1962] M.L.J. viii.

(8) *Goh Ah San & Ors.* v. *The King* [1938] M.L.J. 95.

(9) *R.* v. *Sussex Justices, Ex parte McCarthy* [1924] 1 K.B. 256.

(10) *Public Prosecutor* v. *Heng You Nang* [1949] M.L.J. 285.

(11) *Queen Empress* v. *Durga Charan* (1885) I.L.R. 7 All 672.

(12) *Queen Empress* v. *C.P. Fox* (1885) I.L.R. 10 Bom. 176.

(13) *State of Bombay* v. *Geoffrey Manners & Company* A.I.R. 1951 Bom. 49.

(14) *A.S. Naidu* v. *State of Madhya Pradesh* [1975] Cr. L.J. 498.

(15) *Bhaskaran* v. *State* [1978] Cr. L.J. 738.
(16) *Re Nachimuthu* [1958] Cr. L.J. 1197.
(17) *Mulaim Singh* v. *State* [1974] Cr. L.J. 1397.
(18) *Re Swire* (1885) 30 Ch. D. 239.
(19) *Thynne* v. *Thynne* [1955] 3 All E.R. 129.
(20) *R.* v. *Michael* [1976] 1 Q.B. 414.
(21) *R.* v. *Saville* [1980] 1 All E.R. 861.
(22) *Milson* v. *Carter* [1893] A.C. 638.
(23) *The Crown* v. *Habibullah & Anor.* A.I.R. 1950 Lah. 250.
(24) *Hatton* v. *Harris* (1892) A.C. 547; 62 L.J. P.C. 24.
(25) *Chua Han Mow* v. *Superintendent of Pudu Prison* [1980] 1 M.L.J. 219.
(26) *R.* v. *Lewes Prison (Governor), Ex parte Doyle* [1917] 2 K.B. 254.
(27) *Sharma* v. *Union of India & Anor.* A.I.R. 1968 Delhi 156.

The following cases were also referred to in argument:- *Greene* v. *Secy. of State for Home Affairs* [1941] 3 All E.R. 388; *P.D. Shamdasani* v. *Central Bank of India* A.I.R. 1952 S.C. 59; *Ghulam Sarwa* v. *Union of India* A.I.R. 1967 S.C. 1335; *Janardhan Reddy* v. *State of Hyderbad* A.I.R. 1951 S.C. 217; *Jamna* v. *Emperor* 27 Cr. L.J. 37; *Venkanna* v. *State of And. Pra.* [1964] 2 Cr. L.J. 377; *Ulfat* v. *State* [1970] Cr. L.J. 767; *R.* v. *Rouse* (1914) 10 Cr. App. Rep. 179; *R.* v. *Gomer* (1949) 33 Cr. App. Rep. 91; *Mohd. Wasi* v. *State* A.I.R. 1951 All 441; *W. Slaney* v. *State* [1956] Cr. L.J. 291; *Banwari* v. *State of U.P.* [1962] 2 Cr. L.J. 278; *R.* v. *Governor of Leeds Prison ex parte Huntley* [1972] 1 W.L.R. 1016; *Thappar* v. *State of Madras* [1950] S.C.R. 594; *R.* v. *Mount* (1875) L.R. 6 P.C. 283; *Gopal Vinayak Godse* v. *The State of Maharashta* A.I.R. 1961 S.C. 600; *Dattatraya* v. *Emperor* A.I.R. 1944 Nag. 286; *R.* v. *Thornton* [1968] Crim. L.R. 98; *R.* v. *Wilkinson* (1970) 54 Cr. App. R. 437; *R.* v. *Fielder* (1926) 19 Cr. App. Rep. 87; *Bijoli* v. *State* A.I.R. S.C. 26.10.64; *B.R. Lawrence* v. *The King* [1933] A.C. 699; *General Medical Council* v. *Spackman* [1943] A.C. 627; *Baker* v. *Oakes* (1877) 2 Q.B.D. 171; *Burdett* v. *Abbott* (1811) 14 East 1 at 150; *Re: Crawford* (1849) 13 Q.B. 613; *Ex parte Fernandez* (1861) 10 C.B.N.S. 3; *R.* v. *Williams* (1909) 3 Cr. App. R. 2; *Re: Featherstone* (1953) 37 Cr. App. R. 146; *Re Wring, Re Cook* [1960] 1 All E.R. 536; *Ex parte Askew* (1963) Cri. L.R. 507.

FEDERAL COURT.

Marina Yusoff for the appellant.

Datuk Abu Talib bin Othman, Attorney-General (*Lim Beng Choon,* Senior Federal Counsel with him) for the respondent.

Cur. Adv. Vult.

Lee Hun Hoe C.J. (Borneo) (delivering the judgment of the Court): This appeal against the dismissal of an application for *habeas corpus* and the refusal to grant a declaration that a warrant of committal issued by the Deputy Registrar is invalid and bad in law may be compendiously stated as raising the question of jurisdiction of this court.

On May 18, 1976 appellant was convicted on three charges under the Prevention of Corruption Act, 1961, and sentenced to one year's imprisonment on the first charge and two years each on the second and third charges, the sentences to run concurrently. He was also ordered to pay $225,000 to UMNO (United Malay National Organisation), Selangor. On January 24, 1977 in a separate trial he was convicted on two charges under sections 458 and 109 of the Penal Code and sentenced to six months' imprisonment on the first charge and a fine of $15,000 on the second charge. In both cases he appealed to this court. On June 10, 1977 in Federal Court Criminal Appeal No. 19 of 1976, "the first appeal"[1] was dismissed and the sentences were confirmed except that this court ordered the sum of $250,000 to be paid to the Federal Government as fine and not to UMNO, Selangor. On December 6, 1977 in Federal Court Criminal Appeal No. 11 of 1977, in respect of "the second appeal",[2] this court enhanced the sentences from six months to four years' imprisonment on the first charge and instead of a fine of $15,000 imposed three years' imprisonment on the second charge, the sentences to run concurrently. He was granted bail pending his appeal to the Privy Council for special leave to appeal to the Yang di-Pertuan Agong. It should be made clear that both appeals were heard by this court on different dates. In both appeals the sentences were stated to run concurrently to denote, as the learned judge rightly pointed out, concurrent effect in each of the cases and not between the cases. Following the dismissal by the Privy Council of the appellant's application for special leave the Registrar, High Court, Kuala Lumpur, issued two separate warrants of committal both dated February 28, 1978 in respect of the two appeals. Appellant commenced his sentence on March 1, 1978. The learned judge referred to problems in the apprehension of appellant after the Privy Council refused him special leave to appeal.

By paragraph 2 of a letter ref: PN.O.123/15 dated August 14, 1979 to the Chief Registrar, the Solicitor-General stated: —

> "2. I have now been informed that the Prison Authorities take the view that the sentences in respect of all the cases were ordered to run concurrently. I do not know whether this is correct for if my memory serves me right, it was clearly made known by the court that the sentences in respect of Criminal Appeal No. 11 of 1977 should take effect upon the completion of the sentences in respect of Federal Court Criminal Appeal No. 19 of 1976."

When the letter was referred to the Lord President he consulted Wan Suleiman F.J. and Wan Hamzah J. who sat with him in the second appeal. They looked at the letter, the order and the warrant of committal. They were clearly not satisfied that the order and the warrant of committal reflected the decision of this court to have the sentences in Federal Court Criminal Appeal No. 11 of 1977 to commence on the expiration of the sentences in Federal Court Criminal Appeal No. 19 of 1976. On the direction of the Lord President, the Deputy Registrar, High Court, Kuala Lumpur, rectified what the Attorney-General considered to be an inadvertent omission by issuing a fresh warrant of committal on August 29, 1979 backdated to February 28, 1978. The fresh warrant of committal is word for word the same as the earlier warrant of committal except for those words to make clear that "these sentences (are) to commence on the expiration of the sentence imposed on him by the High Court and affirmed by this court in Federal Court Criminal Appeal No. 19 of 1976." Appellant was informed verbally by the Prison Authorities on September 1, 1979 that he would not be released on October 29, 1980 but around February 28, 1982. He took no step to seek clarification in respect of the fresh warrant of committal until October 30, 1980 when by a notice of motion he applied for a writ of *habeas corpus* and a declaration that the fresh warrant of committal is invalid and bad in law. He also contended that his confinement in prison after October 29, 1980 is wrong-

ful and illegal. He believed he was entitled as of right to remission of one third of his term of imprisonment. The motion was supported by affidavits sworn by appellant and Hamzah bin Wahi alias Mat Wahi the then Director of Prisons. In reply the respondent filed an affidavit sworn by the Deputy Registrar. The contents of the Deputy Registrar's affidavit pertaining to the real decision of this court had not been challenged. Having heard the parties the learned judge dismissed the application and refused to grant the declaration. Appellant appealed on various grounds.

The attack on the judgment is mainly on the ground of jurisdiction of this court to amend its own order. The contention is that this court has no jurisdiction to amend its earlier order. This has also been argued before the learned judge. In fact, all the points argued before us were also raised in the court below. With respect, the learned judge was perfectly right to say in effect that this was not a case where he could grant a writ of *habeas corpus* or make a declaration. The several reasons he gave for dismissing the application have not been challenged. First, as appellant is a convicted person serving a sentence imposed by a superior court of competent jurisdiction *habeas corpus* is not available to appellant: see *Carus Wilson's* case;[3] *Gurdit Singh's* case[4] and *Re Francis Robert Newton.*[5] Secondly, *habeas corpus* cannot be used as a means of reviewing the decision of a superior court: see *Re Dunn.*[6] The determination by an inferior court can be reviewed by a superior court on ground of jurisdiction by way of *certiorari.* In the present case the application to the High Court is for a writ of *habeas corpus* and a declaratory judgment to challenge the decision of the highest criminal court in the country. The learned judge treated the action for declaratory judgment for the purpose of argument as if it was brought in a proceeding for *habeas corpus.* There was no objection from the parties to the manner the matters were dealt with by the learned judge. In the circumstances he was perfectly right to do so. After all, an action for declaratory judgment is merely an alternative procedure for questioning a determination of an inferior tribunal on ground of lack of jurisdiction. It would be the height of absurdity to suppose that an inferior court could question or review the decision of a superior court.

Appellant contended that the two sets of sentences imposed on him in two separate cases should run concurrently and not consecutively as the original warrants of committal were silent on this and that the fresh warrant of committal was irregular and of no effect. In other words, where a court makes no order as to whether two sets of sentences are to run concurrently or consecutively the assumption is that they are to run concurrently.

It may be useful to set out the comparative provisions of our Criminal Procedure Code and the Indian equivalent. Section 292 of our Criminal Procedure Code reads: —

"292.(i) When a person who is an escaped convict or is undergoing a sentence of imprisonment is sentenced to imprisonment such imprisonment shall commence either immediately or at the expiration of the imprisonment to which he has been previously sentenced, as the court awarding the sentence may direct...."

Section 427(1) of the 1973 Indian Code, corresponding to section 397 of the 1898 Code states: —

"When a person already undergoing a sentence of imprisonment is sentenced on a subsequent conviction to imprisonment or imprisonment for life, such imprisonment or imprisonment for life shall commence at the expiration of the imprisonment to which he has been previously sentenced, unless the court directs that the subsequent sentence shall run concurrently with such previous sentence...."

Appellant contended that the Indian provisions were not helpful. Reference was made to section 282(d) of our Criminal Procedure Code which reads:—

"282. With regard to sentences of imprisonment the following provisions shall be followed:

....

(d) every sentence of imprisonment shall take effect from the date on which the same was passed unless the court passing such sentence otherwise directs."

As the court made no direction at the time sentences were passed whether the two sets of sentences were to run concurrently or consecutively the assumption on the ground of fairness was that they were to run concurrently. If the court intended to order the sentences in respect of the second appeal to commence on the expiry of the sentences in respect of the first appeal then the court should make the order at the time the sentences were imposed. This was also made clear by the *Registrar's Circular No. 7 of 1961*[7] on Concurrent and Consecutive Sentences of Imprisonment issued on December 30, 1961. The effect of sections 282(d) and 292 of the Criminal Procedure Code is stated to be that "unless the court imposing a sentence says anything to the contrary the sentence runs from the date on which it was passed. If it is intended that it should run not from the date it was passed, but from the expiration of some other sentence, whether imposed by the same court or imposed by another court at any time, then the court must make an order accordingly. If this is done it should be done at the time the sentence is imposed."

It is also the contention of appellant that where the matter has been finally disposed of by a court it had no power to review, override, alter or interfere with the judgment it had made in any manner except to correct clerical errors. *Goh Ah San & Ors.* v. *The King*[8] was cited to show that once the certificate of the result of the appeal had been issued the court was *functus officio.* Appellant argued that not only the order of conviction but also sentences awarded and the direction whether they should run concurrently or consecutively constituted integral parts of the judgment. The fresh warrant of committal was not only illegal but also contrary to principle of natural justice and established practice. The statement by Lord Hewart C.J. that "justice should not only be done but should manifestly and undoubtedly be seen to be done in *R.* v. *Sussex Justices, Ex parte McCarthy*[9] was referred to.

All the points raised by appellant were argued before the learned judge. For he stated quite clearly that the points raised were not new and had been raised in our courts as well as in other jurisdictions. Thus, at page 37 of the Record of Appeal in his judg-

ment before construing section 278 of the Criminal Procedure Code he said: —

"Shorn of all the rhetorics the issues are only concerned with the extent of the powers of a superior court to review and rectify its own records."

Section 278 of the Criminal Procedure Code reads: —

"278. No court, other than a High Court, having once recorded its judgment, shall alter or review the same: provided that a clerical error may be rectified at any time, and that any other mistake may be rectified at any time before the court rises for the day."

Appellant contended that the learned judge was wrong to construe this section to mean that the superior courts can go beyond rectifying clerical errors and other mistakes. *Public Prosecutor* v. *Heng You Nang*[10] was cited to support the proposition that once a judgment in a criminal matter has been pronounced and signed it cannot be altered. *Queen Empress* v. *Durga Charan;*[11] *Queen Empress* v. *C.P. Fox*[12] and *State of Bombay* v. *Geoffrey Manners & Company*[13] were to the same effect.

Looking at section 292 of our Criminal Procedure Code and section 397 of the Indian equivalent the learned judge considered that despite the different emphasis given with regard to the effect of subsequent sentences the discretion given to the court is the same in both sections. With respect, we agree with him on this. Indian authorities are only persuasive and not binding. It is not surprising where an Indian authority is referred to on a particular point of law almost invariably there is another authority of equal standing holding contrary view on the same point of law. There has been some divergence of opinion in construing section 397(1) in the Indian Courts as to whether the discretion under the subsection can be exercised after an appeal or revision relating to the subsequent conviction and sentence has been disposed of by the High Court. For this exercise the learned judge cited and relied on *A.S. Naidu* v. *The State of Madhya Pradesh*[14] in preference to *Bhaskaran* v. *State;*[15] *Re Nachimuthu*[16] and *Mulaim Singh* v. *State*[17] because *Naidu's* case[14] was a reference to a Full Bench. The court held that the subsection confers an independent power on the court to direct a subsequent sentence awarded in a case to run concurrently with the sentence awarded in an earlier case which can be exercised even after the disposal of the case on merits since it does not involve any review of the judgment on merits. At page 499 in *Naidu's* case[14] Raino J. made the following observations: —

"A judgment in a criminal case consists of the important elements: a finding on the charge and, in the case of conviction, the nature and quantum of sentence. The exercise of the power under subsection (1) of section 397 does not in any way modify or alter the judgment in the case in which the subsequent sentence has been awarded inasmuch as it does not affect the nature or quantum of sentence. It is a power pertaining to the manner of execution of the subsequent sentence rather than the award of appropriate sentence according to law. Therefore, the direction to make the sentence awarded in a subsequent case to run concurrently with the sentence awarded in a case decided earlier does not amount to review of the judgment in which the subsequent sentence is passed. Since no modification of the judgment itself is involved, the power to make the two sentences run concurrently under subsection (1) of section 397 of the Code can be exercised at any time when the matter is brought to the notice of the court by an application or otherwise. No doubt it would be proper to exercise this power at the time of deciding the case itself on merits whether on appeal or otherwise; but the court cannot be said to have become functus officio and as such not competent to exercise the power when the case has already been decided on merits whether on appeal or otherwise. In our view, the power can be exercised even at a later stage, being an independent power conferred by subsection (1) of section 397 of the Code not involving any review of the judgment on merits."

Another ground of appeal is that the court has no inherent jurisdiction to amend its own record in this case. In imposing sentence there is nothing in the record of appeal to indicate in any way that the court intended the sentences in the second appeal to be concurrent or consecutive to the sentences of the first appeal. In such a situation the sentences are regarded as concurrent. That was the view of the Prison Authorities. See also *Registrar's Circular No. 7 of 1961.*[7] As early as 1885 the Court of Appeal in *Re Swire*[18] considered itself to have inherent jurisdiction over its own orders. It could amend an order subsequently "provided the amendment be made without injustice or on terms which preclude injustice." This is an important power which the court ought to be able to exercise in a proper case in order to put right something which is incorrectly stated and to keep its records in line with the real position. In *Thynne* v. *Thynne*[19] the Court of Appeal held that the court had power under its inherent jurisdiction to amend an order of the court after it had been drawn up and entered, so as to make the position under it clear and free from ambiguity although that power did not extend so far as to allow the court to amend an effective part of its order, e.g. question of status or proof of matrimonial offence. In *R.* v. *Michael*[20] which was cited and relied on by the learned judge to support the view that quite apart from the power to alter or recall an order before it has been perfected by entry, all the authorities show that the court has an inherent jurisdiction to amend or rectify any order recorded in its records to make such record accord with the order intended by the court. *R.* v. *Michael*[20] was followed in *R.* v. *Saville.*[21] With respect, on the authorities, the learned judge was perfectly right to state that a superior court as a court of record has an inherent jurisdiction to remedy mistakes in its record, e.g. accidental omission: see *Milson* v. *Carter.*[22] The inherent power is an extraordinary power which ought to be exercised fairly, cautiously and rarely and only when the court considers that the ends of justice require it.

The further submission of appellant is that amending an order of this nature one and half years after it was made is inequitable as it suddenly added two years to appellant's term of imprisonment. The learned Attorney-General pointed out that the quantum of sentence remained the same. Accidental or inadvertent omission can always be corrected at any time. This is not a question of reviewing or altering sentences. The warrant of committal was amended to reflect the decision of this court. The Deputy Registrar's affidavit was not challenged. This court is clearly competent to correct omission. In *The Crown* v. *Habibullah & Anor.*[23] where in passing a death sentence the judge omitted to incorporate in his judgment statutory direction under section 368 of the Criminal Procedure Code that "the accused be hanged

by the neck till he is dead" it was held that as the words were inadvertently omitted the court had inherent jurisdiction to make the necessary correction. Such correction could be made after a lapse of 40 years: see *Hatton* v. *Harris.*[24]

The question of issuing a fresh warrant of committal to replace a defective one was considered in *Chua Han Mow* v. *Superintendent of Pudu Prison.*[25] In dismissing an application for *habeas corpus* Syed Othman F.J. held that although the first committal orders were erroneous they could be cured by the simple expedient of directing the committal courts to issue fresh committal warrants in proper form. He accordingly directed them to do so. In delivering the judgment of this court dismissing the appeal, Raja Azlan Shah C.J. (Malaya) observed that: —

"In the face of that formidable array of authority we are satisfied that the fresh committal warrants which were in proper form, issued by the same committal courts following the committal orders before the hearing of the present appeal are a good and sufficient answer to the application for writs of *habeas corpus.* Where as here there is jurisdiction to commit the applicant, formal or technical defects in the warrants of commitment are not a good ground for the granting of the writs: see *R.* v. *Lewes Prison (Governor), Ex parte Doyle.*"[26]

Appellant complained that certain principles had been violated especially when the prosecution communicated with the court behind the back of the appellant. Backdating the order and the warrant issued at the instigation of the prosecution with no reference to appellant or his representatives, giving them no opportunity to make submission or even to appear to hear the alteration are clearly contrary to the common law. The amended order could not be said to have been made by this court. The decision to amend the order would seem to have been made by the Lord President in Chambers. The learned Attorney-General took exception to the remarks of counsel for appellant about backdoor approach. The letter he wrote to the Chief Registrar was not a backdoor approach in getting the order amended. He was merely doing his duty as a public servant by seeking the clarification from the court whether the sentences were to run concurrently or consecutively. There was no question of denial of justice as appellant was able to engage a lawyer of his choice and sentences were passed in his presence. In *Datuk Haji Harun bin Haji Idris & Ors.* v. *Public Prosecutor*[2] very strong words were used by the learned trial judge to describe the unlawful activities and practices carried out by appellant and those concerned in running Bank Rakyat. The offences committed by appellant were serious involving millions of dollars belonging to poor people from rural areas.

It was clear that this court intended appellant to be sufficiently punished for his crimes as he was seen as the main actor in the drama. The intention of this court to make the sentences consecutive was clear from the affidavit of the Deputy Registrar. At the footnote of the above case the following statement appears: —

"When the third appellant appeared in the Federal Court on Tuesday, February 28, 1978, after having failed to obtain special leave to appeal from the Privy Council, the Lord President stated that when the judgment was delivered the court had overlooked section 283(b)(4) of the Criminal Procedure Code, and that as the intention of the court was and is that the third appellant should serve (i) one day and (ii), in the event of his failing to pay the fines of $20,000, a total of six, not twelve months, the warrant of commitment will be so worded, if the third appellant failed to pay the fines. The latter chose to pay the fines. See [1978] 2 M.L.J. at p. cli."

We understand appellant was not present in court on February 28, 1978. With respect, we agree with the Attorney-General that it was nothing more than an inadvertent omission on the part of the court until the matter was drawn to the attention of the court. Accidental or inadvertent omission can be corrected by the court. The amended order or warrant should not be construed as a review or alteration of the earlier order as the question of sentence remained the same. In our judgment the question of *functus officio* does not arise in carrying out administrative function which need not be performed in court, e.g. drawing up a warrant of committal. A distinction must be drawn between administrative act and judicial act. The court has the administrative function of enforcing its decision or order by authorising its enforcement. In drawing up the warrant of committal the Deputy Registrar was merely performing an administrative act.

As pointed out by the learned Attorney-General appellant's appeal is on a technical ground regarding procedure adopted by this court in carrying out its order. The court should look at the substance of the matter rather than the technicalities. It is important in our view that the administration of justice should be fair and impartial. It should not only be fair to the prisoner but also fair to the Government and fair to the public at large for whose protection penal laws are made and administered. In *Sharma* v. *Union of India & Anor.*[27] it was held that under Article 227 of the Indian Constitution the High Court in a *habeas corpus* proceeding was not entitled to go into the alleged irregularities in procedure adopted by a Court Martial when trying a person brought before it in accordance with law to stand trial on charges within its competence and jurisdiction. In the present appeal the circumstances are even stronger. It is not possible for the High Court to go into the question of procedure adopted by this court. The proper remedy for appellant is neither the writ of habeas corpus nor a declaration but the royal prerogative.

With respect, we agree with the view of the learned judge when he concluded his judgment in these words: —

"In my view the philosophy and principle in *Chua Han Mow* v. *Superintendent of Pudu Prison*[25] and certainly in *Milson* v. *Carter*[22] and *Reg.* v. *Michael*[20] can equally be applied to the facts of the present case because in the final analysis the subsequent warrant of committal referred to here merely altered in form the first warrant of committal in so far as the latter failed or omitted to describe the actual decision of the Federal Court.

Based on the foregoing the application is dismissed. Declaration refused."

The learned judge was clear in his mind that the alteration made in the subsequent order and warrant was a rectification made solely to conform with the decision of this court made in the proper exercise of its discretion. As a court of last resort this court was perfectly competent to amend its order and warrant to reflect its real decision. That was effected by the

Deputy Registrar who was merely performing an administrative function in the judicial process. The application before the learned judge was not only groundless but also unprecedented. Accordingly, we would dismiss the appeal.

Appeal dismissed.

Solicitors: *Marina Yusoff & Co.*

RE HAJI MOHAMED EUSOFF, DECD. KOK SU WIN v. NG KOON MEE

[F.C. (Raja Azlan Shah C.J. (Malaya), Chang Min Tat & Salleh Abas F.JJ.) January 27 & March 3, 1981]

[Ipoh — Federal Court Civil Appeal No. 246 of 1980]

Probate and Administration — Receiver of estate appointed by court — Application for leave to begin proceedings against receiver — No binding agreement — Leave refused.

Practice and Procedure — Application for leave to begin proceedings against receiver of estate — Leave refused.

In this case the appellant as executrix of the estate of her late husband, Ling Liong Chin, applied for liberty to begin proceedings against the receiver of the estate of Haji Mohamed Eusoff bin Mohamed Yusoff for specific performance of an alleged agreement based on an offer to sell two pieces of land belonging to the estate made by the receiver and the administrators to her late husband and accepted by him. Leave was refused in the High Court and the appellant appealed.

Held: the appellant had not shown that there was a valid and binding agreement of sale entered into as alleged by her and the learned judge was correct in holding that this was not a proper case for the grant of leave.

Case referred to:-

(1) *Degroot* v. *Jay* 30 Barb. (N.Y.) 483.

FEDERAL COURT

S. Jeyapalan for the appellant.

M. Sivalingam (*N. Selvarajah* with him) for the respondent.

Cur. Adv. Vult.

Chang Min Tat F.J. (delivering the judgment of the Court): The originating summons, in which the application has been made, is an action by the beneficiaries of the estate of Haji Mohamed Eusoff bin Mohamed Yusoff. Of the estate Ng Koon Mee the respondent was appointed receiver on July 22, 1968 by an order of court.

The appellant as the executrix of the estate of her late husband, Ling Liong Chin, (Ling) applied by summons-in-chambers in the action for liberty to begin proceedings against the receiver for specific performance of an alleged agreement to sell two pieces of land belonging to the estate made by the receiver and the administrators to her husband and accepted by him.

While there appears to be no statutory provision which requires a party to obtain the leave of the court to sue a receiver,

"the receiver is the officer of the court, and, by the well settled practice, permission of the court was necessary to warrant an action against him. The rule is intended for the protection of receivers against unnecessary and oppressive litigation, and should be carefully maintained. It is a contempt of the court to sue a receiver without such permission . . . ."

see *Degroot* v. *Jay*.[1] No point was however taken whether the leave to be obtained should be applied for in the same probate action.

If leave had been obtained, presumably the appellant will choose a convenient vehicle for her contemplated action for specific performance, but without the leave of court, she could not do anything. She failed to obtain this leave, and it is clear from the judgment of the High Court that the learned judge was not satisfied on the affidavit evidence and the evidence of the various documents exhibited thereto that there was such a valid and binding agreement of sale entered into as alleged by her.

Considerable difficulties lay in the path of the appellant. The agreement, if any, was reached by Ling. She could not speak from personal knowledge. She had to rely on the correspondence left behind by Ling and other documentary evidence. Quite a few matters are therefore seriously disputed between the parties.

But there can be no doubt about the intention to sell the lands. An order of court to sell the lands was obtained on April 14, 1965. By advertisement in the *New Straits Times* issue of December 11, 1974, pursuant to this order of court, the lands in question were offered for sale by tender, subject to certain terms and conditions, of which the most relevant are that the sale was subject to the approval of the court and the vendor/receiver reserved the right to withdraw any of the lands for sale before the same was actually sold, without declaring the reserve price. Clearly and beyond argument, the order of court specifying that the sale was to be by tender called for sufficient advertisement, receipt of tenders, opening of the letters of tender and the taking of a decision which tender to accept and to seek the approval of the court for.

We now turn to the appellant's affidavit for her version of the part played by Ling in the tender exercise. What she affirmed was:

"2. Towards the end of 1974 Ng Koon Mee, the receiver, and Ahmad Nazri bin Haji Mohamed Eusoff and Fatimah binti Haji Mohamed Eusoff, the administrators of the estate of Haji Mohamed Eusoff bin Mohamed Yusoff, offered to sell to my late husband the lands held under C.T. 19815 for Lot No. 2923S and C.T. 19806 for Lot No. 2914S Town of Ipoh (hereinafter called the said lands) for the sum of $200,000/- and my late husband accepted the offer.

3. By letter dated January 3, 1975 M/s. Lim Kean Chye & Co. solicitors for the said receiver and the said administrators, demanded payment of the deposit for the sale of the said lands and on January 6, 1975 M/s. Gill & Co. solicitors for my late husband forwarded $20,000 being the deposit to M/s. Lim Kean Chye & Co. On January 7, 1975 an emergency meeting was held at the office of M/s. Lim Kean Chye & Co. when the various offers for the said lands were considered and it was decided that the offer made by my late husband be accepted.

4. On June 10, 1975 M/s. Lim Kean Chye & Co. returned the cheque to M/s. Gibb & Co. stating that the Administrators and Receiver had decided not to accept the offer and forwarded the cheque for $20,000. My late husband refused to accept the return of the deposit and M/s. Gibb & Co. sent the cheque for $20,000 back to M/s. Lim Kean Chye & Co. All attempts by my late husband and later by me to get the respondents to abide by the agreement of sale has (sic) not been fruitful."